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No. 739

IN THE

Supreme Court of the United States

October Term, 1955

BARNEY FRENCH, *Petitioner*,
v.
STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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Barney French, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered on the 14th day of December, 1955, wherein said Court affirmed the judgment of the Criminal District Court of Harris County, Texas.

Opinions Below

The opinions below appear:

Opinion of the Court of Criminal Appeals of Texas, entitled *Barney Ellis French, Appellant v. The State of Texas,*

Appellee, reported in 284 S.W. 2d 359. It is printed in the appendix hereto, page 15.

Opinion of the Court of Criminal Appeals of Texas, entitled *Otis Wayne Harper, Appellant v. The State of Texas, Appellee,* reported in 284 S.W. 2d 362. It is printed in the appendix hereto, page 19. Said case is the one referred to in the judgment in petitioner's case, and is the reason for the final judgment being deferred in petitioner's case, because of the identical question being involved (R. 212).

Jurisdiction

Petitioner's motion for rehearing was overruled on the 5th day of October, 1955, and the judgment of the Court of Criminal Appeals was entered on the 5th day of October, 1955, and by order of the Court, December 14th, 1955, was made the effective date of the final decree. The judgment is printed in the appendix, on page 26.

The jurisdiction of this Court is invoked under Title 28, *U. S. C. A.,* Section 1257(3).

The Court of Criminal Appeals of Texas is not an intermediate court. It is the court of last resort in Texas in all matters within its jurisdiction. Its judgments are not reviewed by the Texas Supreme Court, or by any other Texas Court.

Petitioner objected to the admission in evidence of certain marijuana, which was obtained by authority of an ordinance of the City of Houston, Texas, authorizing an arrest on suspicion, said ordinance being Sec. 1649. The objections urged being that said ordinance was not authorized by Art. 214, C. C. P., was a violation of Art. 1, Sec. 9, of the *State Constitution,* the Fourth Amendment to the

United States Constitution, and Art. 727, C. C. P., and on appeal, raised the issue of the denial of due process of law, and equal protection of the laws as guaranteed under the Fourteenth Amendment to the *United States Constitution*.

Question Presented

Whether the Court of Criminal Appeals of the State of Texas erred in holding Sec. 1649 of the ordinances of the City of Houston, Texas, valid, and in so doing, violated the Fourth, and Fourteenth Amendments to the Constitution, or either of them.

Constitutional Provision, Statutes and Ordinance Involved

The pertinent constitutional provision, statutes, and ordinance are printed in the appendix hereto, on page 28.

Statement of the Case

On the 19th day of November 1954, petitioner was charged by indictment with the offense of possession of marijuana, of which charge he was found guilty by a verdict of the jury, and his punishment assessed at seven years' imprisonment in the penitentiary.

Upon appeal the case was affirmed by the Court of Criminal Appeals of Texas, to which Court this petition for writ of certiorari is directed.

On the 27th day of October, 1954, between 8:00 and 8:30 P. M. Officers Tucker and Free, both of whom were Police Officers of the City of Houston, Texas, were sitting

in a parked automobile, about 75 feet from the Trade Winds Cafe, a public place, located on Capitol Avenue, in a well-lighted area, in the City of Houston, Texas, when they saw petitioner approaching the east door of said cafe. Petitioner walked up to the door and appeared to look inside, and then left, trotting to the rear of said cafe, where he got in his automobile, and started to leave, at which time said officers arrested him, searched him, and his automobile, and took from his person, and his automobile, what was later found to be marijuana, as testified to by a chemist, on the trial of this case, and which formed the basis of the prosecution of petitioner.

At the time petitioner approached said door of said cafe, uniformed police officers were questioning, and arresting some people, in said cafe.

During the trial of said case, the State offered in evidence Sec. 1649 of the ordinances of the City of Houston, Texas, for the purpose of showing the authority of the officers in making the arrest of petitioner, and said ordinance was admitted in evidence (R. 50-51), at which time petitioner objected to it on the ground that it was invalid. The objections urged being that said ordinance was not authorized by Art. 214, C. C. P., was a violation of Art. 1, Sec. 9, of the *State Constitution,* the Fourth Amendment to the *United States Constitution,* and Art. 727, C. C. P. (R. 51), and on appeal, in his motion for rehearing, which is a part of the record in this case, he raised the issue of the denial of due process of law, and equal protection of the laws as guaranteed under the Fourteenth Amendment to the *United States Constitution,* and the Court of Criminal Appeals held said ordinance valid, under the holding in *Holt v. State,* 160 S.W. 2d 944.

The marijuana which the officers seized was seized by the authority given under said ordinance to make the arrest of petitioner, and for that reason, the trial court admitted it in evidence, over the objection of petitioner (R. 142-146).

Reasons For Granting This Writ

The opinion of the Court of Criminal Appeals makes it clear in its opinion that its decision affirming the conviction, rests primarily on the validity of Sec. 1649, of the ordinances of the City of Houston, Texas, wherein it says:

> "The city ordinance of the City of Houston, adopted pursuant to the provisions of Article 214, V.A.C.C.P., was introduced in evidence. This appears to be the same ordinance which this Court upheld in Holt v. State, 160 S.W. 2d 944, authorizing the arrest, detention and search of persons of suspicious demeanor."

In the *Harper* case, appended hereto, the Court practically withdrew its holding in the *Holt* case, and said:

> "The appellant contends that the ordinance of the City of Houston goes much further than is authorized by Article 214, V.A.C.C.P., and is therefore not authorized by the statute.
>
> "In the two Holt cases, the facts surrounding the arrest and search of the Holts are not set forth, and therefore are of little aid to us here. We note, however, that the court held the fruits of the search admissible under both the ordinance and Article 325, V.A.C.C.P."

The ordinance is not authorized by Art. 214, C.C.P., and is therefore invalid. Art. 214, C.C.P. only authorized municipal authorities to make it an ordinance, and beyond such authority, they cannot go.

Art. 214, C.C.P. does not give municipal authorities a blank check to enact an ordinance which would authorize an arrest without warrant except on the grounds set forth in Art. 214 C.C.P. This is so because criminal statutes are strictly construed, and under the rule of "expressio unius est exclusio alterius" said ordinance is invalid. "Expressio unius est exclusio alterius" means the expression of one thing is the exclusion of another. This rule surely applies in this case.

The ordinance authorizes policemen to arrest and interrogate all persons of suspicious demeanor, character or conduct, whereas Art. 214, C.C.P., only authorized the arrest of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or about to commit some offense against the laws. The ordinance does not lay down any rule as to what is meant by "suspicious demeanor, character or conduct," and leaves it wholly to the judgment of the arresting officer to place his own interpretation on said quoted words. Since there is no standard of what constitutes a person of "suspicious demeanor, character or conduct," said part of the ordinance is too vague to be valid.

The ordinance provides that if a person is arrested, and does not give a satisfactory account of himself, he shall be placed in jail. Such part of the ordinance is invalid for the following reasons:

1. It requires the person to speak, whereas it is his constitutional right to remain silent. It is well settled that the right of freedom of speech carries with it the right to remain silent.

2. It requires the person arrested to make a statement while under arrest, which is a flagrant violation of Art. 727, C.C.P.

3. It requires the officer to put such person in jail if he refuses to speak, which violates both the Constitution, and Art. 727, C.C.P It penalizes him by requiring him to be incarcerated, if he does not speak.

The ordinance does not give the officer the right to "arrest, and search," on suspicion, but only to "arrest and interrogate," and then only, if on such interrogation such person fails to give a satisfactory account of himself," he may be "taken in custody."

In appellant's case there was no "interrogation," therefore, even under the ordinance no "right of arrest" existed.

The words "arrest and interrogate," when construed with the context of the ordinance, have the meaning of "detain and interrogate," or "accost and interrogate," or "approach and interrogate," or, in other words as giving the officer the right to ascertain who such persons are, where they came from, their business, etc., and then, if such persons fail to give a "satisfactory account of themselves," to pursue the arrest further by taking them in custody. Any other construction renders the ordinance ambiguous, and meaningless.

The ordinance is also invalid, for the reason that it is left to the officer to determine whether a person's account of himself satisfies the officer, a thing that seems untenable under all the law.

In the case of *Joske v. Irvine*, 43 S.W. 278, it was said:

"We find nothing in the articles quoted to authorize the city council of the city of San Antonio to pass an ordinance empowering police officers to arrest any citizen who might by them be deemed dangerous and suspicious. That no such dangerous grant of power was intended by the legislature is shown by section 230 of the charter which prescribes the circumstances under which arrests without warrants may be made. It is as follows: 'The marshals and policemen may arrest any person committing any offense against the peace of the city or a breach of any city ordinance committed in their presence, or on complaint of any person, without a warrant.' So jealous have the American people been of the preservation of the personal liberty of the citizen that safeguards have been thrown about it in the organic law, both state and national, and in the defense of it the citizen has been clothed with resistance even to the extent of taking human life. Indeed, the vitality and face of our system of government rests upon individual liberty, and our laws are framed upon the great principle that, so long as the citizen does not infringe upon the rights of others, he shall be protected in the enjoyment of absolute personal liberty. Our state constitution grants to the citizen security in his person, and our criminal procedure has carefully specified the circumstances under which he may be arrested without warrant by state and county officers, and has clearly indicated the only circumstances under which a town or city may authorize an arrest without warrant, upon suspicion. In Article 249 of the Code of Criminal Procedure of 1895 it is provided: 'The municipal authorities of towns and cities may establish rules authorizing the arrest without warrant, of persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to com-

mit some offense against the law'. That article applies to all towns and cities, whether chartered specially or by the general statute, and there is nothing in the charter of San Antonio that indicates that the legislature intended to remove that city from the operation of that law. On the other hand, the powers and duties of the officers are, in the charter, to be limited by the constitution and statutes of the state. See section 131, above cited. The ordinance of the city of San Antonio under which Shely claimed that he acted was not offered in evidence, and the only proof offered of its existence was the testimony of Shely. Admitting that this testimony was true, and that the city of San Antonio, through its council, did confide in its policemen, the power, at discretion, to adjudge a citizen a suspicious person, and cast him into prison, it is the opinion of this court that it was an attempt to confer upon its policemen a power unprecedented in a free government, and utterly subversive of the principles upon which our whole system is founded. The grant of such power is unauthorized by constitution, statutes, and the charter and will meet with no sanction or favor in the courts of the country. It attempts to clothe the petty officers of a city with more power than is granted to any department of our government,—the power to pass summary judgment upon a human being, and incarcerate him in a dungeon, although innocent of any crime against law or society, and without the opportunity of being heard in his own defense. The facts in this case offer a pregnant example of the consequences flowing from the exercise of such power. The trial judge properly instructed the jury that the arrest was unlawful."

The case of *Price v. Durdin, et al.,* 207 S.W. 2d 228, affirms the rule that in order to justify an arrest under an ordinance enacted pursuant to Art. 214, C.C.P. the place of arrest must be a "suspicious place," and the person ar-

rested at such place, have been found thereat "under such circumstances as reasonably show" that such person has been guilty of some felony or breach of the peace, or threatens, or is about to commit some offense against the laws.

It is difficult to understand how this court can hold, even under the ordinance, that appellant was a person of suspicious demeanor, character or conduct. It is not known why appellant hurriedly left the cafe. It might have been that he had an appointment at another place, and suddenly remembered it, but the most plausible conclusion is that he, like any other normal person, did not want to be rounded up in a raid, and that is surely what would have happened if he had not left the cafe, as he did. Did this make appellant a person of suspicious demeanor, character or conduct?

The opinion cites the case of *Holt v. State*, 160 S.W. 2d 944, as authority for upholding the ordinance, but apparently, the ordinance was not under attack in that case, as it is here, otherwise the court would have discussed its validity in that case. Even if the Court had held the ordinance valid in the *Holt* case, and it now becomes apparent that it is not, it is the duty of the Court to correct its holding.

It was said by the learned Judge Davidson in the case of *Bessett v. State*, 180 S.W. 249, that:

> "The Court ought to be correct in deciding the law, rather than consistent in error."

The opinion cites the case of *McCutcheon v. State*, 252 S.W. 2d 175, as authority for upholding the arrest in this cause.

It is submitted that the *McCutcheon* case has no bearing on the instant cause, for the reason that in that case it is

shown that there was in existence an ordinance which tracked the provisions of Art. 214, *C. C. P.* In the *McCutcheon* case, it was said:

> "The State first proved that the city of Lufkin had adopted, as authorized by Article 214, C. C. P. an ordinance authorizing arrests without warrants of persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the State law or a city ordinance."

In the case of *Horrell v. State*, 61 S.W. 2d 108, it was said:

> "It is not to be understood that an arrest may be made on mere suspicion."

It will be noted that the ordinance does, in effect authorize an arrest on suspicion. It authorizes the arrest of all persons of "suspicious demeanor, character or conduct," and that is the only part of the ordinance under which appellant could have been arrested. Under the facts, it cannot be said that he was arrested under that part which authorizes an arrest if the officer "has good reason to believe that such persons intend, or are about to commit, or have committed any violation of the laws or ordinances of the city."

To hold the ordinance valid, will be to take a step toward the destruction of a constitutional guaranty, and the creation of a "police state." It will lead to innumerable abuses by city policemen, and confer upon them more power than has ever been conferred upon any other officers who are authorized to make arrests. It is "the foot in the door" marking the destruction of a constitutional guaranty,

and the decadence of a democracy, a "creeping up" on its destruction. A democracy cannot endure unless the rights of the citizen are protected by the courts. They must stand as a bulwark between the citizen and governmental encroachment, otherwise all fundamental rights will be destroyed, and the democracy will cease to exist.

In this connection it would be well to heed the warning of the learned Judge Davidson. In *Ex parte Gilmore*, 228 S.W. 199, he said:

> 'May it not be that "our own like free states forgone, is but a bright leaf torn from time's dark forest, and in the wild gust thrown to float awhile, by varying eddies borne, and sink at last forever?" '

In view of the foregoing, it is appellant's contention that he has been denied due process of law, and equal protection of the laws as guaranteed to him under the 14th Amendment to the United States Constitution.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari to the Court of Criminal Appeals of the State of Texas should be granted.

Respectfully submitted,

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Certificate

I hereby acknowledge receipt of a copy of the foregoing Petition for Writ of Certiorari this_____day of March, 1956.

Attorney General of the State of Texas,

By _____
Asst. Attorney General